UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. Rosario Cuevas, d/b/a El Pollo Real, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100263.

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

A. Procedural History

On March 20, 1990, the Complainant personally served a Notice of Inspection on Respondent.

Based on the inspection of March 20, 1990, Complainant personally served Respondent with a Notice of Intent to Fine on July 24, 1990. After receiving the Notice of Intent to Fine, Respondent requested a hearing on this matter. Respondent's request was dated August 8, 1990.

On August 23, 1990, Complainant filed a Complaint with the Office of Chief Administrative Hearing Officer (OCAHO). The Complaint charged Respondent with violating 8 U.S.C. § 1324a(a)(1)(B), § 274A(a)(1)(B) of the Immigration and Nationality Act (the Act), by hiring Yolanda Lacarra for employment in the United States and failing to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9). The amount of civil monetary penalty averred in the Complaint is $750.00.

Complainant mailed its Interrogatories and Requests for Admissions of Facts and Authenticity of Documents to Respondent on August 31, 1990. Respondent's answers to the Interrogatories and Requests for Admissions were received on September 26, 1990.

Respondent filed its Answer to the Complaint on September 20, 1990. Respondent's Answer simply states that ``it is denied that the respondent has violated provisions of 8 U.S.C. 1324a.'' Respondent does not allege any affirmative defenses to the Complaint in its Answer.

On October 29, 1990, Complainant filed a Motion for Summary Decision. Pro se Respondent has failed to respond to Complainant's

Motion. This case is presently set for hearing on December 10, 1990.

B. Legal Standards for Motion for Summary Decision

The federal regulations governing practice in employer sanctions administrative hearings authorize an administrative law judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 28 C.F.R. § 68.36 (1989); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue of material fact as shown by the pleadings, affidavits, discovery and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 108 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby,'' 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); see also, Consolidated Oil and Gas, Inc. v FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved.). There is no genuine issue as to a material fact when the allegations of the complaint have been admitted by the opposing party through its response to requests for admissions. E.g., Stubbs v. Commissioner of IRS, 797 F.2d 936, 937-38 (11th Cir. 1986); National Advertising Co., Inc. v. Dick, 640 F. Supp. 1474 (S.D. Ind. 1982).

Summary decision should be granted when the record, viewed in its entirety, is devoid of a genuine issue as to any outcome determinative fact. See Anderson v. Liberty Lobby, Inc., supra; see also, Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, at 480 (``An issue is not material simply because it may affect the outcome. It is material only if it must inevitably be decided.''). A fact is ``outcome determinative'' if the resolution of the fact will establish or eliminate a claim or defense; if the fact is determinative of an issue to be tried, it is ``material.'' Id.

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See, e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by the facts in the affidavit of the party opposing the motion, they are ad-

mitted.''); and, U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact.).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.8(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d 621 (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

The Supreme Court has analyzed the application of summary decision or summary judgment in administrative proceedings. The Court held that, in order to cut off an applicant's hearing rights, the pertinent regulations may be ``particularized.'' See, Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (``. . . the standard of well-controlled investigations particularized by the regulations is a protective measure designed to ferret out . . . reliable evidence . . . .).

C. Findings of Fact and Conclusions of Law Supporting Summary Decision

The employer sanctions provisions of the Immigration Reform and Control Act (IRCA) make it unlawful to hire, after November 6, 1986, persons for employment in the United States without verifying their employment eligibility. 8 U.S.C. § 1324A(a)(1)(B).

The verification process has two steps. First, the employee must attest under penalty of perjury that he or she is either a citizen, a lawfully admitted permanent resident, or an alien otherwise authorized to work in this country. This attestation must be made on a form designated by the Attorney General. See 8 U.S.C. § 1324a(b)(2); 8 C.F.R. § 274a.2(b)(1)(i). Second, the employer must verify the employee's employment eligibility by examining specified documents and recording their identifying numbers on the same form designated by the Attorney General (the Form I-9). ⌊8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(ii).

In order to comply with the verification requirements, an employer must record information about the documentation he or she examines in section 2 of the Form I-9. The employer must sign a

certification attesting, under penalty of perjury, that he or she has examined the documents listed in section 2, that the documents appear to be genuine and relate to the employee, and that the employee is eligible to work in the United States. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(1)(ii).

Unless the employee is hired to perform less than three days' work, the employer must complete section 2, including the certification, within three working days of the date of hire. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(1)(ii). If the employee is hired for less than three days, section 2 and the certification must be completed before the end of the employee's first working day. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(1)(iii).

In the case at bar, Respondent denies that she failed to properly record identity and employment eligibility document information in section 2 of the Form I-9 at issue. However, close examination of Yolanda Lacarra's Form I-9 reveals that no information is recorded in List A and none in List B. Blocks 1 and 2 are checked in List C, but no document identification numbers are recorded. The regulations clearly require the employer to verify and record the documentary data establishing the identity and employment eligibility of the employee. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(1)(vi).

Further, Respondent admits, in its answer to Complainant's Requests for Admissions and Authenticity of Documents, that the Form I-9 at issue is a true and accurate copy of the original Form I-9 that was presented to INS Agents for inspection on April 9, 1990. Respondent also admits in its answer to Complainant's Requests for Admissions and Authenticity of Documents the authenticity of the business records which show that the employee in question was employed by Respondent.

Thus, since the Form I-9 is incomplete on its face, and Respondent's business records show that the individual named in the Complaint was employed by Respondent, there are no material facts at issue, and summary decision is an appropriate disposition of this case.

Accordingly, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B), in that Respondent hired for employment in the United States Yolanda Lacarra without complying with the verification requirements provided for in Section 1324a(b)(1) of Title 8 and 8 C.F.R. § 274a.2(b)(1) and (ii).

D. Assessment of Civil Penalty

Having determined that Respondent is liable for Count I of the Complaint, I am now required to determine an appropriate civil monetary penalty. The minimum amount which can be assessed for

Count I is $100.00 and the maximum amount that can be assessed is $1,000.00. See 8 U.S.C. § 1324a(e)(5) and § 274a.10(b)(2) of the Act. Complainant requests $750.00 as a civil monetary penalty. For the reasons stated below, I find Complainant's request for a $750.00 penalty to be fair and reasonable, taking into account all mitigating factors.

In determining an appropriate civil penalty, where the amount alleged in the complaint exceeds the minimum amount allowed by law, I am required to give ``due consideration to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien and the history of previous violations.'' See 8 U.S.C. § 1324a(e)(5) and 8 C.F.R. § 274a.10(b)(2).

I have, heretofore, consistently applied a mathematical analysis to the mitigating factors in determining what is a fair and reasonable civil penalty to assess. See, United States v. Felipe, OCAHO Case No. 89100151 (Oct. 11, 1989), aff'd by CAHO, November 29, 1989; see also, United States v. Juan V. Acevedo, OCAHO Case No. 89100397 (Oct. 12, 1989); United States v. Basim Aziz Hanna, DBA Ferris and Ferris Pizza, OCAHO case No. 89100331 (July 19, 1990) (Order Granting Complainant's Motion for Summary Decision and Setting Case For A Hearing To Determine Appropriate Civil Money Penalty). Under the Felipe formula, I give equal weight to each of the five factors ($180.00 per mitigating factor, which represents the difference between $100.00, the minimum that can be accessed, and $1,000.00, the maximum that can be accessed, divided by five.) and from an assessment of each of those factors arrive at an appropriate civil penalty. I do this by deducting from the maximum allowed assessment of $1,000 per violation, a percentage of $180.00 per factor, depending upon what percentage I determine should be mitigated on that factor. For example, if I find that each factor should be fully mitigated, I will deduct $180.00 * five or $900.00 from $1,000.00 and assess a minimum fine of $100.00.

Applying the Felipe formula to the undisputed evidence in this case, I make the following findings:

(1) Size of Business

The Respondent operates a restaurant at a single location and has employed anywhere from six to nine employees during the period from 1989 to 1990. The estimated annual sales reported to the City of Bakersfield for 1989 was $170,000. Respondent's total wages for the quarter ending September 30, 1989, was $13,058.50. The number of employees at the end of this period was nine (9). Respondent's total wages for the quarter ending January 1, 1990,

was $12,093.13. The number of employees at the end of this period was seven (7).

In Felipe, I held that a family owned restaurant business, which had been in operation since 1988, with nine (9) full-time employees, including the daughter of the owners, wages in 1988 totalling $55,443.00, and a taxable income in 1988 of $9,806.00 was a small business. I therefore mitigated the civil penalty in the full amount for this factor. In reaching that conclusion, I stated at p. 8 that:

> I hold this view because I do not think that Respondent's closely held restaurant business is, as yet, at a stage of growth and development where a non-mitigated fine would substantially enhance the possibility of compliance with IRCA's record-keeping provisions.

I also stated in Felipe that, in determining the size of the business, I would consider: (1) the business revenue or income; (2) the amount of payroll; (3) the number of salaried employees; (4) the nature of ownership; (5) the length of time in business; and (6) the nature and scope of business facilities.

Although the record in this case does not show the amount of payroll or the profit and loss of Respondent's business, it is clear that Respondent is a ``small business'' under the Relipe analysis because of its size, limited number of employees, and annual sales. Moreover, in its Motion for Summary Decision, Complainant admits that Respondent is a ``small business.'' I will therefore mitigate the fine in the full amount of $180.00 for size of business.

(2) Good Faith of the Employer

The Border Patrol Agent's report dated July 6, 1990, which is set forth below, details the important facts relevant to Respondent's education and knowledge of IRCA's paperwork requirements prior to the violation alleged in this case. It is my view that these undisputed facts clearly show that Respondent did not act in ``good faith'' by failing to complete section 2 of the Form I-9 for Yolanda Lacarra.

According to the report, ``the company received an IRCA educational visit on July 1, 1987, and was informed of the requirements to complete an I-9 Form on all employees hired after November 6, 1986.''

The report further states that, ``on January 3, 1989, the company received another IRCA educational visit. The company was represented by the assistant manager, Mr. Aguilar. Agent Moore gave Mr. Aguilar a copy of the M-274 Handbook for Employers with his name and the telephone number on the outside. Later that same day, Agent Moore contacted the owner, Mrs. Cuevas, telephonically and confirmed she had received the M-274 Handbook for Employers. After explaining IRCA requirements to Mrs. Cuevas, Agent

Moore asked if she had any questions concerning IRCA and she said, `No.'''

The report further states that, ``on January 6, 1989, an investigative inspection of I-9 Forms was conducted at the company's worksite. The company presented seven (7) I-9 Forms. Once again, Agent Moore informed Mrs. Cuevas of IRCA's requirements and gave her another M-274 Handbook for Employers with his name and telephone number on the outside. Agent Moore asked Mrs. Cuevas to please call if she had any questions concerning IRCA.

The report further states that, ``as a result of the I-9 inspection, a Warning Notice was served by Agent Moore at the Respondent's worksite on January 24, 1989. The company was represented by the owner, Mrs. Cuevas. Agent Moore went over each I-9 Form listed in the Warning Notice, and explained to Mrs. Cuevas what was wrong and how to correct it. Agent Moore asked Mrs. Cuevas if she understood how to make all the corrections on the I-9 Forms, and she said, `Yes.' Agent Moore gave Mrs. Cuevas another M-274 Handbook for Employers with his name and telephone number on the outside and asked her to call if she had any questions.''

The report further states that, ``on May 23, 1989, an investigative inspection of I-9 Forms was conducted at the company's worksite by Agents Borland and Moore. The company was represented by Mrs. Cuevas. The company presented fourteen (14) I-9 Forms. During the audit, Agent Moore recognized the I-9 Form for Alvarez-Padilla, Manuel as one of the I-9 Forms listed in the Warning Notice served on the company January 24, 1990. In reviewing the I-9 Form, it was clear the discrepancies listed on the Warning Notice had not been corrected. Agent Moore asked Mrs. Cuevas why she had failed to make the corrections. She stated she `had forgot to do it.' Agent Moore asked Mrs. Cuevas if Alvarez-Padilla, Manuel was still working for the company, and she said, `No.' She informed Agent Moore that Alvarez-Padilla, Manuel was terminated on March 31, 1989. It should be noted that the Warning Notice was served on January 24, 1989, and the owner allowed the employee to continue to work, without examining a document to establish identity or indicating an alien number in Section 1, for an additional sixty-six (66) days. Before departing, Agent Moore again informed Mrs. Cuevas of IRCA (sic) requirements and gave her another M-274 Handbook for Employees.''

The report further states that, ``on June 5, 1989, Agent Moore went to the company's worksite where Mrs. Cuevas presented two (2) DE3DPs[1] with ending dates on March 31, 1989 and December

[1]These are State of California Quarterly Contribution Returns.

31, 1988. She informed Agent Moore that the DE3DP with an ending date of December 31, 1988, listed a former employee by the name of Everado Tatengo. She states that she had completed an I-9 Form for Everado Tatengo but lost it. Before departing, Agent Moore requested Mrs. Cuevas provide the dates of hire and termination for Everado Tatengo.''

The report further states that, ``as a result of the I-9 Form inspection, a Notice of Intent to Fine and Warning Notice were served by Agent Moore at the company's worksite on September 7, 1989. The company was represented by Mrs. Cuevas. Agent Moore went over each violation listed in the Notice of Intent to Fine and Warning Notice and explained to Mrs. Cuevas what was wrong and how to correct it. Agent Moore asked Mrs. Cuevas if she understood how to make the corrections and she said, `Yes.' Agent Moore gave Mrs. Cuevas another Handbook for Employers with his name and telephone number on the outside. He asked Mrs. Cuevas to please call if she had any question concerning IRCA.''

The report further states that, ``on March 20, 1990, Agent Moore went to the company's worksite and served a Notice of Inspection. The company was represented by the owner, Mrs. Cuevas. Agent Moore took the opportunity to again inform the company IRCA (sic) requirements and asked Mrs. Cuevas to please call if she had any questions concerning IRCA.''

Lastly, the report states that, ``on April 9, 1990, an investigative inspective of I-9 Forms was conducted at the company's worksite by Agent Moore. The company was represented by Mrs. Cuevas. While Agent Moore was examining the I-9 Form pertaining to Yolanda Lacarra, he noticed the company had failed to examine documentation to establish identity. Agent Moore asked Mrs. Cuevas why she had examined a List C document but failed to examine a List B document. Mrs. Cuevas replied by saying that the employee may have filled out that section of the I-9 Form. Agent Moore informed Mrs. Cuevas that the employee listed in Section 1 cannot examine her own documents in Section 2. Further, he pointed out that section 2 was signed by Mrs. Cuevas. Mrs. Cuevas then stated that she may have failed to examine a document for List B because she was busy. Agent Moore asked Mrs. Cuevas if she understood that the law required the company to examine one document from List A or one document from List B and one from List C. Mrs. Cuevas responded by saying that she understood how to fill out the I-9 Form. Agent Moore asked Mrs. Cuevas if she had records showing the `date of hire' and termination of Yolanda Lacarra. After checking her records, Mrs. Cuevas presented a sheet of paper,

signed and dated by her, which indicated Yolanda was hired on August 13, 1989, and terminated on November 27, 1989.''

In Felipe, I defined ``good faith'' as a ``standard which requires a showing of an honest intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act in accordance with it.''

I find that Respondent, in failing to complete section 2 of the Form I-9 for Yolanda Laccara, did not exercise ``good faith'' for the following reasons: (1) Respondent was educated about its responsibilities as an employer under IRCA on numerous occasions prior to November 27, 1989; (2) Form I-9 inspections (or Audits) conducted prior to August 13, 1989, show that Respondent failed to correct verification inadequacies previously discussed with Respondent; (3) Respondent received two (2) separate Warning Notices from the INS prior to November 27, 1989, which advised Respondent that it was failing to properly complete section 2 of the Form I-9 for other employees not named in the Complaint; and (4) Respondent's explanation that she failed to properly complete section 2 of the Form I-9 for Yolanda Lacarra because she was ``busy,'' suggests indifference towards the law and compliance with its requirements, and negates any argument of ``good faith.'' I am therefore not mitigating the civil penalty to any extent for ``good faith.''[2]

(3) Seriousness of Violation

In Felipe, I stated that it was a very serious offense to deliberately refuse to fill out any part of an I-9 Form. I further stated that ``relatedly, but somewhat less serious, is the negligent failure to fill out any part of an I-9 Form. Such a failure, even if it is due to `mere carelessness,' is still, in my view, `serious,' because it completely defeats the purpose of the employment eligibility verification program.''

In United States v. Juan V. Acevedo, OCAHO Case No. 89100397 (October 12, 1989), Respondent was charged in Count II of the Complaint with failing to properly complete and sign section 2 on twelve (12) Forms I-9. I did not mitigate any amount of the civil penalty for seriousness of the violation in Acevedo because ``failure to complete any part of section 2, including an employer's failure to sign his or her name is, in my view, a serious violation.''

Although Respondent did sign section 2 of the Form I-9 for Yolanda Lacarra on August 19, 1989, she did not complete the document examination portion of section 2. I do not see any significant

[2]Based upon my review of the evidence in this case, I commend the INS agents for their patience and diligent efforts to educate Respondent in the verification requirements of IRCA.

difference between what occurred in Acevedo and the case at bar. In both instances, the employer, due to carelessness or negligence, permitted an employee to work for them who may or may not have been authorized for employment in the United States.

Respondent's failure to properly complete section 2 of the Form I-9 is in some ways more serious than what the Respondent in Acevedo did because of the educational visits, inspections and Warning Notices it received from the INS prior to the termination of Lacarra. Since I find Respondent's failure to complete section 2 a serious violation of IRCA, I will not mitigate the civil penalty for seriousness of the violation.

(4) Unauthorized Alien

Neither the Complaint nor any evidence submitted to me by the parties suggests that Yolanda Laccara, at the time of her employment with Respondent, was an ``unauthorized alien.'' I will therefore mitigate the civil penalty in the amount of $180.00 for this factor.

(5) History of Previous Violations

The record in this case shows that, prior to the violation alleged in the Complaint, Respondent received two (2) Warning Notices for IRCA violations, one on January 24, 1989, and one on September 7, 1989. The Warning Notice of January 24, 1989, related to a January 6, 1989, inspection of Forms I-9 at which apparently seven (7) Forms I-9 were incorrectly prepared, including that of Manuel Alvarez-Padilla. The Warning Notice of September 7, 1989, related to a June 5, 1989 inspection at which Respondent was unable to produce a Form I-9 for a former employee named Everado Tatengo. Respondent was also served with a Notice of Intent to Fine on September 7, 1989, but the record is not clear as to its disposition.

I therefore find that no amount shall be mitigated for the factor of previous violations because Respondent violated IRCA's verification requirements eight (8) times prior to the violation alleged in the Complaint, failed to correct one of the violations after it was shown to Respondent,[3] and continued to disregard its obligation to comply with IRCA after numerous warnings to do so.

(6) Conclusion of Monetary Penalty Assessment

Having carefully considered all the mitigating factors required by our regulations and having analyzed the evidence with respect thereto, I find that the fine of $750.00 is fair and reasonable.

D. Ultimate Findings of Fact and Conclusions of Law

[3]The records shows that Manuel Alvarez Padilla's Form I-9 was not corrected as of May 23, 1989.

In addition to the findings and conclusions previously mentioned, I make the following ultimate findings of fact and conclusions of law:

1. As previously found and discussed, I have determined that Respondent Rosario Cuevas, DBA El Pollo Real, violated 8 U.S.C. sections 1324a(a)(1)(B), 274a(a)(1)(B) of the Immigration and Nationality Act, in that she hired for employment in the United States, after November 6, 1986, Yolanda Lacarra without complying with the verification requirements of section 274A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(1) and (ii).

2. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil monetary penalty of seven hundred and fifty dollars ($750.00).

3. That the hearing scheduled for December 10, 1990, is hereby cancelled.

4. That, pursuant to 8 U.S.C. § 1324a(e)(6) and 28 C.F.R. § 68.52, this Decision and Order shall become the final decision and order of the Attorney General, unless within thirty (30) days from this date, the Chief Administrative Hearing Officer shall have modified or vacated it.

SO ORDERED: This 3rd day of December, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge